(1)

Supreme Court, U.S.
FILED

NO. 95-443 AUG 29 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

HARRY D. BONAR,

Petitioner,

V.

DOROTHY M. (BONAR) MOSER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Steven M. Askin
ASKIN & ASSOCIATES
P.O. Box 1167
Martinsburg, WV 25401
(304) 264-2424

Counsel of Record
for Petitioner

Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

57 pp

QUESTION PRESENTED FOR REVIEW

I. PETITIONER SAYS THAT HIS RIGHT TO DUE PROCESS OF LAW PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY AN ORDER OF OCTOBER 31, 1994 ENTERED BY THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA AWARDING JUDGEMENT TO THE RESPONDENT FOR THE SUM OF $125,080.00 WHICH REPRESENTS ALIMONY PAYMENTS AND INTEREST ALLEGEDLY OWED BY PETITIONER TO RESPONDENT BASED UPON A PREVIOUS ORDER ENTERED AGAINST PETITIONER IN THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA ON MARCH 28, 1977. PETITIONER SAYS AS A RESULT OF THE ENTRY OF THE OCTOBER 31, 1994 ORDER HE WAS DEPRIVED OF PERSONAL PROPERTY WITHOUT THERE FIRST BEING ADEQUATE NOTICE; WITHOUT THERE BEING A FULL AND FAIR HEARING WITH THE OPPORTUNITY TO CROSS EXAMINE AND CONFRONT ADVERSE WITNESS; AND WITHOUT THERE BEING AN ADEQUATE THE RIGHT TO PRESENT WITNESSES AND/OR EVIDENCE ON HIS OWN BEHALF.

PARTIES TO THE PROCEEDING

1. Harry D. Bonar, Petitioner

2. Steven M. Askin, Counsel for Petitioner, P.O. Box 1167, Martinsburg, WV 25401.

3. Dorothy M. Bonar (Moser), Respondent.

4. Pat A. Nichols, Counsel for Respondent, Box 201, Parsons, WV 25401.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table of Contents of Appendix v

Table of Authorities vi

Opinions Below 1

Jurisdiction 2

Constitutional Provisions, Statutes, and Regulations 3

Statement of the Case. 4

Question Presented for Review:

I. PETITIONER SAYS THAT HIS RIGHT TO DUE PROCESS OF LAW PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY AN ORDER OF OCTOBER 31, 1994 ENTERED BY THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA AWARDING JUDGEMENT ON BEHALF OF THE RESPONDENT FOR THE SUM OF $125,080.00 WHICH REPRESENTS ALIMONY PAYMENTS AND INTEREST BASE UPON A PREVIOUS ORDER IN THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA ENTERED MARCH 28, 1977. PETITIONER SAYS AS A RESULT OF THE ENTRY OF THE OCTOBER 31,

1994 ORDER HE WAS DEPRIVED OF PERSONAL PROPERTY WITHOUT THERE FIRST BEING ADEQUATE NOTICE; A FULL AND FAIR LEGAL PROCEEDING WITH THE OPPORTUNITY TO CROSS EXAMINE AND CONFRONT ADVERSE WITNESSES; AND THE RIGHT TO PRESENT WITNESSES AND/OR EVIDENCE ON HIS OWN BEHALF. . . .24

Conclusion. 38

Appendix. A-1

Certificate of Service

TABLE OF CONTENTS OF APPENDIX

Order, In the Circuit Court of Tucker County, West Virginia October 31, 1994 . . . . . A-1

Order, West Virginia Supreme Court of Appeals, May 31, 1995 . . . . . A-7

TABLE OF AUTHORITIES

CASES:

Ali v. Ali, 652 A.2d 253 (N.J.Super. Ch. 1994). 37

Boddie v. Connecticut, 401 U.S. 371 (1971). 29

Dandridge v. Williams, 397 U.S. 471 (1970). 29

Dobrzenski v. Dobrzenski, 528 N.W.2d 827 (Mich.App. 1995) 37

Fuentes v. Shevin, 407 U.S. 67 (1972).32

Goldberg v. Kelley, 397 U.S. 254 (1970) 30

In re marriage of Shikany, 887 P.2d 153 (Mont. 1994). 37

James M.B. v. Caroline M., 456 S.E.2d 16 (W.Va. 1995). 27

LaRue v. LaRue, 304 S.E.2d 312 (W.Va. 1983) 28

Millard v. United States, 916 F.2d 1 (Fed.Cir. 1990). 35

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). 32

North Georgia Finishing, Inc. v. Di-Chem Inc., 419 U.S. 601 (1975). 31

Peck v. Jones, 878 P.2d 390 (Okl.App. 1994). 36

Raley v. Raley, 437 S.E.2d 770 (W.Va. 1993). 28

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). 32

RULES:

Rule 10.1(c) of the Rules of the United States Supreme Court 2

Rule 60(b) of the West Virginia Rules of Civil Procedure. . . . . .passim

CONSTITUTIONAL PROVISIONS:

Fifth Amendment to the United States Constitution. . . . . passim

Fourteenth Amendment to the United States Constitution. . . . . passim

No. 95-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

HARRY D. BOMAR,

Petitioner,

V.

DOROTHY M. (BOMAR) MOSER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On October 31, 1994, the Circuit Court of Tucker County, West Virginia entered an Order awarding the Respondent the sum of $125,080.00 which represents alimony payments and interest allegedly

due and owing to the Respondent by the Petitioner from July 13, 1983 and through the month of September, 1994. Thereafter the West Virginia Supreme Court of Appeals declined to hear Petitioner's Petition for Review thereby affirming by unpublished order of May 31, 1995 the October 31, 1994 Order of the Circuit Court of Tucker County, West Virginia. Thereafter on the 9th day of August, 1995 a stay of the Order of October 31, 1994 was awarded to your Petitioner by the West Virginia Supreme Court of Appeals, said stay to expire on the 29th day of August, 1995.

JURISDICTION

Petitioner claims jurisdiction pursuant to Rule 10.1(c) of the Rules of the United States Supreme Court.

Petitioner says the judgement of the Circuit Court of Tucker County, West Virginia, entered on October 31, 1994 (Appendix 1), and thereafter affirmed by unpublished order of the West Virginia Supreme Court of Appeals dated the 31st day of May, 1995, decided an important question of federal law adverse to your Petitioner, to-wit: whether the Fifth and Fourteenth Amendments to the United States Constitution afford protection to your Petitioner and others same situate from the removal of and/or deprivation of their property without adequate notice, proper hearing, and/or the right to confront witnesses and evidence against them and/or present evidence on their own behalf.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Fifth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

Rule 60(b) of the West Virginia Rules of Civil Procedure

STATEMENT OF THE CASE

This is an Appeal of the Order dated and entered on the 31st day of October, 1994 in the matter styled below, Dorothy M. Bonar v. Harry D. Bonar, Civil Action No. 76-C-19, entered and/or filed in the Circuit Court of Tucker County, West Virginia. Pursuant to the terms of said order, the Respondent was awarded $125,080.00 consisting of alleged past due alimony payments and interest from July 13, 1983, through the month of September, 1994. On July 12, 1993, the

Respondent executed an affidavit to establish back alimony arrearages and interest. The affidavit alleged that your Petitioner owed alimony arrearages from October 1976 through July 1993, including interest, in amount of $213,211.47. Thereafter on the 22nd day of July, 1993, the Respondent filed a petition to establish alimony arrearages setting forth that your Petitioner owed to her the amount set forth in the affidavit of $213,211.47 in past due alimony and interest. Respondent based her cause of action upon an order having been entered on the 28th day of March, 1977, wherein the Petitioner and Respondent were granted a divorce by the Circuit Court of Tucker County, West Virginia and permanent alimony was

awarded to the Respondent in the sum of $600.00 per month to be paid each and every month until the death of the Respondent or until her remarriage. Petitioner says that not only did the order clearly set forth that he, the Petitioner, failed to appear at said hearing, Petitioner's affidavit and replication filed on August 26, 1993 in response to Respondent's petition and affidavit set forth that he did not receive notice of the March 28, 1977 hearing that took place in the Circuit Court of Tucker County and further that Petitioner was unaware that a final order in the amount of $600.00 a month had ever been entered. Thereafter, hearings were conducted before the Circuit Court of Tucker County, West Virginia on June 13,

1994, July 13, 1994, September 26, 1994, at which time the Circuit Court of Tucker County heard and/or received limited testimony and/or evidence from the parties. Immediately prior to the commencement of the June 13, 1994 hearing, your Petitioner filed a Motion to Dismiss and supporting Memorandum of Law. The Circuit Court of Tucker County considered Petitioner's Motion to Dismiss at the June 13, 1994 hearing and concluded that there was no authority to dismiss the case on the grounds that the Petitioner was not given proper notice and did not attend the hearing on March 28, 1977. The Court further reasoned that notwithstanding the fact that Petitioner and his counsel failed to appear on March 28, 1977, the record

reflects that Petitioner's former counsel, Jerome Radosh, filed a Rule 60(b) Motion requesting that the Petitioner be relieved of the final Order entered on March 28, 1977, and further that it appeared that no Hearing was ever held on the Petitioner's Rule 60(b) Motion.

The Court then considered Petitioner's argument that the Respondent was prohibited by laches and the undue passage of time from recovering any past due alimony and also considered Petitioner's argument that if the Court concluded that the Petitioner did owe past due alimony such award was limited to ten (10) years preceding the institution of the action to obtain such arrearages. The Court also considered

the Petitioner's argument that various tracts of improved and unimproved real property owned by the parties during their marriage and ultimately sold by the Respondent should have been considered and credited toward any past due alimony award. However, the Court held that it would not reconsider or readdress any property settlement matters between the parties prior to the March 28, 1977 divorce decree. The Court then concluded that any past due alimony payments beyond ten (10) years were barred by the statute of limitations.

The Respondent, Dorothy M. Bonar, then testified that she was seventy-six (76) years old and was divorced by an Order of the Circuit Court of Tucker County. She testified that she was

married to your Petitioner and lived in Tucker County in 1976 and that the parties had moved to Tucker County in 1967. She testified that your Petitioner had a good paying job in refrigeration in the Washington, D.C., area and made approximately $20.00 per hour. She testified that she was awarded $600.00 per month in alimony pursuant to the divorce decree and that she has never received any monies from her husband. She testified that she never heard from your Petitioner nor had any idea where he was. She testified that she made attempts to locate him in the Washington, D.C., area but never had any communications with him following their divorce. She testified that she subsequently learned your Petitioner's

whereabouts and thereafter instituted the current action. She testified that your Petitioner has not paid her a penny and that she was assisted in calculating the arrearage by a lawyer in North Carolina. She testified that the principal arrearage was $118,635.00 and the interest on the arrearage was $93,576.46. She testified that she has not received any money from your Petitioner from August, 1993, through May of 1994, which totalled $6,000.00 in past due payments in conjunction with the $213,211.47 alleged in the Affidavit filed in July, 1993. On cross examination, Ms. Bonar testified that she had received no payments up to the present time. She testified that she received no payments whatsoever in any form. She testified

that she did not institute any legal action against your Petitioner for a period of almost seventeen (17) years and that the first time she sought a legal remedy was July, 1993 after she located your Petitioner. Thereafter, the proceedings were adjourned and the parties were given the opportunity to brief their respective positions in regard to the statute of limitations on the alimony arrearage.

A Hearing was held on July 13, 1994. Petitioner argued that the entire amount of the alimony arrearage was not collectible. Petitioner argued that laches should apply in this matter on the basis that the Respondent failed to assert her rights for a period of seventeen (17) years. Petitioner also

asserted that this area was a gray area and that the West Virginia Supreme Court had not yet established a bright line rule.

The Circuit Court opined that past due alimony, which is due and unpaid, has the effect of a judgment and consequently ruled that all amounts past due and unpaid through and including July of 1984 are not to be considered as arrearages as they are barred by the ten year statute of limitations on a judgment. The Court also ruled to reject Petitioner's argument that laches should apply to the Respondent's request for arrearages. The Court further clarified its ruling and opined that the Respondent would be entitled to arrearages from July 12, 1993, forward as that is the date upon

which she filed the Affidavit, which tolled the statute of limitations. Thereafter, the proceedings were adjourned and the parties were ordered to reappear at 11:00 a.m., on Monday, the 26th of September, so that both Petitioner and Respondent could be present to offer additional testimony.

The final hearing in this matter was held on September 26, 1994. Initially, the Court reiterated its earlier ruling that the applicable date which tolled the running of the statute of limitations was July 12, 1993. Petitioner represented unto the Court that he desired the opportunity to proffer testimony in regard to five (5) properties that were conveyed and sold by the Respondent which were marital properties and the

Petitioner received no share. However, the Court denied such motion notwithstanding the fact that the Petitioner had deeds and recent appraisals of the former marital properties. Petitioner also motioned to dismiss this matter on procedural grounds on the basis that the matter was not initiated by the Respondent pursuant to Chapter 48 of the West Virginia Code but rather was filed as a generic civil suit. Respondent countered that the matter was properly filed and the matter was not in the nature of a contempt suit. The Court denied Petitioner's motion to dismiss and found that the matter was properly before the Court to which the Petitioner objected.

Petitioner then proffered to the Court certain real and personal property that was not addressed at the time of the original divorce decree prior to October, 1976. Petitioner's testimony indicated that at the time of the marriage the parties owned five (5) particular parcels of real property which were later conveyed by the Respondent. One home in Silver Spring, Maryland; one home in Potomac, Maryland; one home in Gaithersburg, Maryland; one home in Clarksburg, Maryland; as well as property in Tucker County, West Virginia that was addressed in the final divorce decree. Petitioner submitted that such parcels of land should have been addressed and considered as an offset to any alleged arrearages that the Petitioner owed the

Respondent. Petitioner also indicated to the Court that there were certain items of personal property consisting of a Remington 22 caliber 250 varmint rifle; a Remington 243 caliber rifle; a Remington 270 rifle; a 22 caliber hand gun; a belt and holster to that hand gun; a 16 gauge pump shot gun; a 20 gauge pump shot gun; a spotting scope; reloading supplies including press, dyes, scales, a chain saw, one lard press, one sausage grinder, as well as various other articles of clothing. Petitioner also represented unto the Court that the Dry Fork residence was to be sold and the Petitioner was to receive his equitable interest, however he has received nothing to date. Petitioner also proffered to the Court that he never received any

portion of the four (4) Maryland real property conveyances and that the Respondent handled the transactions and then thereafter retained the proceeds.

On cross examination the Petitioner testified that the real estate properties were titled entirely in the Respondent's name and that his name was never on any of the deeds. He testified that he did make an attempt to pick up his items of personalty but that a deputy was waiting there to hand him papers. Petitioner testified that one property was sold for $105,000.00 and that they paid $12,500.00 for it and that the conveyance was some time in 1983. He testified that he was unaware of the property being sold, that he never received notice, and that only after the Respondent brought the

aforementioned action against him did he find out about the conveyance of the real estate. He testified that such realty was supposed to be addressed in a prior agreement through another lawyer in Virginia. He testified that Mr. Radosh represented him during the initial divorce proceedings and that he has made no payments to the Respondent from July, 1983. He testified that he was unaware that an alimony award was assessed at $600.00 per month throughout the time period involved as he had no notice about the award until the filing of the judgment. Petitioner testified that the Maryland properties were transferred before the divorce was granted and that the only property that had at the time of the divorce was the Tucker County

property. Petitioner also testified that he borrowed $10,000.00 from his mother to finish building the house on the Dry Fork property and that when he divorced there was $2,000 to $3,000 owed on such mortgage and to the best of his knowledge the Respondent paid that off.

On re-direct examination, Petitioner testified that he was never aware that the Tucker County property was provided for in the 1977 divorce decree. He testified that pursuant to an agreement he was supposed to receive some money from the property but that he was not aware of it being provided for in the final divorce decree. Petitioner also testified that he disagreed that Respondent was unable to contact him during the interim period following the

divorce as he lived in Woodbridge, Virginia and was working five (5) to six (6) days a week. He testified that he has lived in Woodbridge almost twenty (20) years; he testified that someone could have very easily found him by contacting his local union or checking the phone book. He testified that his name would have been on the tax rolls and that it would have been very easy for the Respondent to locate him. He testified that he never received notice in regard to any prior court proceedings brought by the Respondent against him and that in the late seventies he was only making $10.00 an hour and not $20.00 an hour as the Respondent had previously testified.

Following the testimony and argument of counsel the Court again opined that

the motion to dismiss was denied, that this was a matter of past due unpaid alimony, that the requests to remand back to the Family Law Master was denied, that there was a defined sum of money which is past due and unpaid that has become a debt and can be reduced to judgement in favor of the Respondent against the Petitioner.

The final order of the Circuit Court (Appendix 1) set forth that the applicable date for the statute of limitations was July 12, 1983 and that the amounts owed by the Petitioner for principle arrearage was $81,000.00 and the interest arrearage was $44,080.00 for a total of $125,080.00. The Court denied the Petitioner's argument in regard to equitable distribution of real property

as well as Petitioner's like contention in regard to items of personalty. The Court refused the Petitioner's request to remand the matter back to the Family Law Master for an evidentiary hearing to determine Petitioner's right to a credit or a set off. Finally, the Court ordered and adjudged that the Respondent was entitled to a judgement in the amount of $125,080.00 which included interest at ten (10) percent from July 13, 1983 through September, 1994, which represented all alimony payments past due and owing to the Respondent during such time period (Appendix 1).

Thereafter, Petitioner motioned to extend the appeal period for thirty (30) days and such motion was granted by Order of the Circuit Court entered on March 2,

1995. Thereafter, by unpublished order on the 31st day of May, 1995, the West Virginia Supreme Court of Appeals refused to consider Petitioner's Petition for Appeal of said order thereby affirming the order of the Circuit Court of Tucker County of October 31, 1994 (Appendix 1). Thereafter the West Virginia Supreme Court of Appeals entered a stay of the order of October 31, 1994, for a period of ninety days pending the filing of the Petition for Writ of Certiorari to this Court.

ARGUMENT

ARGUMENT I

PETITIONER SAYS THAT HIS RIGHT TO DUE PROCESS OF LAW PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY AN ORDER OF OCTOBER 31, 1994 ENTERED BY THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA

AWARDING JUDGEMENT TO THE RESPONDENT FOR THE SUM OF $125,080.00 WHICH REPRESENTS ALIMONY PAYMENTS AND INTEREST ALLEGEDLY OWED BY PETITIONER TO RESPONDENT BASED UPON A PREVIOUS ORDER ENTERED AGAINST PETITIONER IN THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA ON MARCH 28, 1977. PETITIONER SAYS AS A RESULT OF THE ENTRY OF THE OCTOBER 31, 1994 ORDER HE WAS DEPRIVED OF PERSONAL PROPERTY WITHOUT THERE FIRST BEING ADEQUATE NOTICE; WITHOUT THERE BEING A FULL AND FAIR HEARING WITH THE OPPORTUNITY TO CROSS EXAMINE AND CONFRONT WITNESS; AND WITHOUT THERE BEING AN ADEQUATE RIGHT TO PRESENT WITNESSES AND\OR EVIDENCE ON HIS OWN BEHALF.

Petitioner submits that the entry of the order of October 31, 1994, deprived your Petitioner of his right to due process of law pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner acknowledges that there were hearings

conducted in the Circuit Court of Tucker County on June 13, 1994, July 13, 1994, and September 26, 1994, prior to the entry of the order but complains that the Circuit Court of Tucker County so limited your Petitioner's rights to have a meaningful hearing on whether or not he would be deprived of the sum of $125,080.00, his above rights were violated. Petitioner makes this assertion based on the fact that when Respondent obtained judgement in this amount against your Petitioner, he was denied the right to raise as a legitimate defense that the underlying March 28, 1977 order was obtained without any notice to your Petitioner. Petitioner says instead of the Circuit Court addressing this issue and providing a

forum for Petitioner to be heard, the Circuit Court of Tucker County insulated the original order from attack. Petitioner points out that even though the decisions of the West Virginia Supreme Court of Appeals recognized that the Petitioner was entitled to have heard a motion pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, see James M.B. v. Caroline M., 456 S.E. 2d 16 (W.Va. 1995), the Circuit Court of Tucker County refused to consider setting aside the original March 28, 1977 judgement upon which the final order of October 31, 1994, was predicated. This ruling by the Tucker County Circuit Court effectively made meaningless any right to be heard at the June 13, 1994, July 13, 1994, and September 26, 1994 hearings on

the ultimate issue of whether the original underlying order was valid. Petitioner says that the Circuit Court of Tucker County further demonstrated its continued willingness to ignore his due process rights by refusing to take into consideration Petitioner's proffer and/or to permit unproffered evidence to be offered that Respondent owed a substantial debt to your Petitioner that should have been held to be a credit as to any monies owed by your Petitioner to said Respondent pursuant to LaRue v. LaRue, 304 S.E.2d 312 (W.Va. 1983) and Raley v. Raley, 437 S.E.2d 770 (W.Va. 1993).

To justify this Court becoming involved in deciding this issue, Petitioner points out this Honorable

Court has recognized that deprivations of Federal Constitutional rights may occur in domestic relations cases. In Dandridge v. Williams, 397 U.S. 471 (1970) this Court recognized that the right to equal protection which one is entitled to receive pursuant to the Fourteenth Amendment to the United States Constitution can be subject to this Court's scrutiny.

This Court also recognized in Boddie v. Connecticut, 401 U.S. 371 (1971) that indigent persons seeking divorce are entitled to the protection of the Due Process Clause of the Fourteenth Amendment to the United States Constitution to insure access to the Courts regardless of their inability to pay fees and costs.

Petitioner submits however that the following decisions from this Court are those most relevant in considering the issues that are before the Court in this case. This Honorable Court in Goldberg v. Kelley, 397 U.S. 254 (1970) recognized that procedural due process under the Fourteenth amendment requires that welfare recipients be afforded an evidentiary hearing before termination of welfare benefit by welfare authorities. In this decision the State of New York created a procedure wherein a post-termination hearing was held as the only means of protection for the welfare recipients. This Honorable Court reasoned that the interests of an eligible recipient in uninterrupted receipt of public assistance coupled with

the State's interest that his payments not be erroneously terminated outweighed the State's countervailing interest in conserving fiscal and administrative resources. This Court held that at a minimum the recipient be afforded the opportunity to confront and cross-examine witnesses; the opportunity to retain an attorney if he or she desires; the opportunity to present oral evidence to an impartial decision maker; and that such decision maker must reach his or her impartial decision based solely on the legal rules and evidence adduced at the hearing.

In North Georgia Finishing, Inc. v. Di-Chem Inc., 419 U.S. 601 (1975) this Honorable Court reaffirmed that the Due Process Clause of the Fourteenth

Amendment to the United States Constitution is violated by a State statute or procedure that permits a writ of garnishment to be issued by an officer authorized to issue an attachment or a court clerk in pending suits on the affidavit of the plaintiff or his attorney containing only conclusary allegations and prescribing the filing of a bond as the only method of dissolving the garnishment pending litigation where there is no provision for an early hearing. This Court discussed the prior decisions in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) and the prior landmark decisions of Fuentes v. Shevin, 407 U.S. 67 (1972) and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Together these series of cases make clear

that depriving the owner of property of the possession and/or use of same without notice and/or adequate opportunity for hearing involving participation by a judicial officer violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Petitioner acknowledges in his case that the hearings that were conducted on June 13, 1994, July 13, 1994 and September 26, 1994 were hearings that were conducted with full notice and were conducted before a judicial officer. Petitioner submits, however, that the hearings did little to protect Petitioner from the original fraudulent judgement for alimony that was rendered against him without his knowledge on March 28, 1977. Petitioner says that the Court's refusal

to consider his motion brought pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure to set aside the default judgement as a result of his not being aware that the judgement had been entered against him and the failure of the Court to permit Petitioner to present evidence as to the real and personal property lost by your Petitioner to the Respondent as a credit against the October 31, 1994 judgement did little to make adequate or meaningful the three hearings conducted to determine to what amount of money your Petitioner must pay to the Respondent.

Petitioner relies on the following Federal Circuit and State Supreme Court decisions to support his position that his right to due process of law pursuant

the Fifth and Fourteenth Amendments to the United States Constitution was violated.

In Millard v. United States, 916 F.2d 1 (Fed.Cir. 1990) the Court addressed a fact situation very similar to that of your Petitioner. An arrearage order was obtained creating a judgement debt and the issue before the Court was whether to enforce that debt against the employer. Discussing the cases cited above the Court recognized that there was no infirmity in the procedures involving the plaintiff/appellant Millard, resting this conclusion on a finding that he had been provided full opportunity to challenged the arrearage judgement in the State where same was entered against him and finally concluding that plaintiff/

appellant Millard had simply failed to avail himself of his rights. Your Petitioner distinguishes this case because the underlying basis for the October 31, 1994 judgement in issue was the underlying March 28, 1977 judgement order which continues to create ongoing decretal judgements during each month that passes. As stated above it is your Petitioner's contention that the hearings conducted in Tucker County in 1994 did not provide a meaningful opportunity to your Petitioner to challenge the original judgement order and in fact same was totally insulated from review by the same Court that initially participated in the entry of same. In Peck v. Jones, 878 P.2d 390 (Okl.App. 1994) the Court of Appeals of Oklahoma, Division Number

Three held that under the facts of the case before it, if the Father's right to be heard in a sister state regarding a motion to modify decree of divorce as to the amount of child support was barred by its statutory laws and court decisions then the District Court's dismissal of the Father's motion to modify child support resulted in denial of his right to be heard in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Additional cases lending support to this argument are Ali v. Ali, 652 A.2d 253 (N.J.Super. Ch. 1994), In re marriage of Shikany, 887 P.2d 153 (Mont. 1994) and Dobrzenski v. Dobrzenski, 528 N.W.2d 827 (Mich.App. 1995). Although the facts in each case are substantially different

than those of your Petitioner they reiterate that depriving one of his or her property in a case that either originated from a divorce or is still an ongoing domestic matter involving child support, alimony, and/or wage attachment for same will violate the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

It is therefore Petitioner's contention that to permit the taking from him $125,000.00 based upon a judgement being entered, without him first being present when the underlying Court proceedings occurred or even aware then or thereafter that same had occurred and thereafter permitting interest to accrue

upon said judgement as a result of Respondent failing to take action for seventeen years not only personally destroys your Petitioner but permits the unlawful deprivation of his property by and through the Courts of the State of West Virginia.

Respectfully submitted,

HARRY D. BONAR, BY COUNSEL

Steven M. Askin
Counsel for Petitioner
ASKIN & ASSOCIATES
P.O. Box 1167
Martinsburg, WV 25401
(304) 264-2424

NO.

IN THE

Supreme Court of the United States

October Term, 1995

HARRY D. BONAR,

Petitioner,

V.

DOROTHY M. (BONAR) MOSER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE WEST VIRGINIA
SUPREME COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Steven M. Askin
ASKIN & ASSOCIATES
P.O. Box 1167
Martinsburg, WV 25401
(304) 264-2424

Counsel of Record
for Petitioner

Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

APPENDIX

A-1 Order, In the Circuit Court of Tucker County, West Virginia, October 31, 1994

A-7 Order, West Virginia Supreme Court of Appeals, May 31, 1995

IN THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA

DOROTHY M. BONAR,
PETITIONER/PLAINTIFF

VS CIVIL ACTION NO. 76-C-19

HARRY D. BONAR,
RESPONDENT/DEFENDANT.

ORDER

On this the 26th day of September, 1994, came the Petitioner, Dorothy M. Moser, (previously Bonar) in person and by her Counsel, Pat A. Nichols and the Respondent, Harry D. Bonar in person and by his Counsel, Paul E. Lane. This matter came on for hearing pursuant to the Court Order of July 12, 1994 which set this matter for hearing this day.

WHEREUPON, the Court reviewed the file in this matter and listened to argument of Counsel. Further, the Court did listen to testimony offered by the

Respondent.

The Court, after consideration of all matters in this case does ORDER and ADJUDGE as follows:

1. That the applicable date for the statute of limitation is July 12, 1983. Any previous amounts owed by the Respondent prior to this date is tolled by the statute of limitations. The Respondent owes the following amounts:

	Principal Arrearage	Interest Arrearage
A. July-December 1983 -	$3,600.00	$3,840.00
B. January-December 1984	$7,200.00	$7,200.00
C. January-December 1985	$7,200.00	$6,480.00
D. January-December 1986	$7,200.00	$5,760.00
E. January-December 1987	$7,200.00	$5,040.00

F. January-December 1988	$7,200.00	$4,320.00
G. January-December 1989	$7,200.00	$3,600.00
H. January-December 1990	$7,200.00	$2,880.00
I. January-December 1991	$7,200.00	$2,160.00
J. January-December 1992	$7,200.00	$1,540.00
K. January-December 1993	$7,200.00	$ 720.00
L. January-September 1994	$7200.00	$ 540.00
TOTAL	$81,000.00	$44,080.00

TOTAL $125,080.00

2. The Court does deny the Respondent's argument as to equitable distribution of real property and the Respondent's contention that certain items of personal property are still in the possession of the Petitioner. The

Respondent does reserve his objections.

3. The Court further refuses the Respondent's request to remand this matter to the Law Master for an evidentiary hearing. To this ruling the Respondent does reserve his objections.

4. The Court does ORDER and ADJUDGE that a judgment is awarded to Dorothy Bonar (now Moser) in the amount of $125,080.00, which includes interest at 10% from July 13, 1983 through the month of September, 1994. This represents all alimony payments due and owing to the Petitioner by the Respondent during this period of time. To all adverse rulings of the Court, the Respondent does save his objections. The Court does find that this matter is now complete and the Court does dismiss this matter from the docket

of this Court. The Circuit Clerk shall send attached copies of this Order to all Counsel of record.

Entered this the 31st day of October, 1994.

JUDGE C. REEVES TAYLOR

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 31st day of May, 1995, the following order was made and entered:

Dorothy M. Bonar, Plaintiff Below,
Respondent

vs.) No. 950718

Harry D. Bonar, Defendant Below,
Petitioner

On a former day, to-wit, April 13, 1995, 1995, came the petitioner, Harry D. Bonar, by Steven M. Askin and Robert C. Stone, Jr., his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Tucker County, rendered on the 31st day of October, 1994, with the record therein accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Judge Fred L. Fox, II, sitting by temporary assignment. Justice Brotherton absent.

A True Copy

Attest: Ancil G. Ramey
Clerk, Supreme Court of Appeals